SUPREME COURT OF THE UNITED STATES.

October Term, 1907.

No. 24.

WILLIAM P. BOUTEMAN, Appellant,

vs.

WILLIAM O. DOUGLAS ET AL., Appellees.

BRIEF ON BEHALF OF APPELLEES.

HENRY E. DAVIS,
JAMES S. EDWARDS,
JOB BARNARD,
Attorneys for Appellees.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1897.

No. 80.

WILLIAM F. HOLTZMAN, APPELLANT,

vs.

WILLIAM G. DOUGLAS ET AL., APPELLEES.

BRIEF ON BEHALF OF APPELLEES.

This is an action of ejectment for lot 8, square 941, in Washington City, brought in 1889, by the appellant, and defended by the appellees, they claiming title by adverse possession.

The lot formerly belonged to David A. Hall, who died in 1870, and thereafter his heirs conveyed to the appellant. The taxes were not paid by Hall, and the lot was sold by the city of Washington at tax sale, and a deed made to William Douglas, the purchaser, 1865 (p. 4). Mr. Douglas recorded his deed July 12, 1865, and died in September of the same year.

The appellees are his heirs at law, and they took possession of the said lot by making a contract of letting to Richard Rothwell, who had already used the lot to store some old pontoons and marble upon it, but without any agreement of lease with any one until 1867. Thereafter

the said Rothwell paid rent for the said lot (p. 7) to the appellees and they paid the taxes (pp. 8, 10, 14).

POINTS.

I.

As to the first alleged error of the court, in allowing an answer to a leading question, we submit that such matter is always in the discretion of the trial court, and the rulings thereon do not constitute such error as will be reviewed by an appellate court, or such as would cause a reversal of the judgment.

Regina *vs.* Murphy, 8 Carrington & Payne, 297.
York *vs.* Pease, 2 Gray, 282.
Commonwealth *vs.* Thrasher, 11 Gray, 57.
Green *vs.* Gould, 3 Allen, 465.

It is also claimed by appellant that this question was improperly allowed, because it called for hearsay evidence.

It was proper to prove *notoriety* of ownership as well as of possession, and such *notoriety* could be proved by showing what was heard by the witness in the neighborhood. It is not admitted as proving, or tending to prove, the truth of the alleged hearsay statement; but the fact that there was such statement—that the lot had a popular designation; was reputed to belong to Douglas; or was known as the "Douglas lot."

II.

The other four errors assigned may be considered together, for they all raise questions of alleged error in the giving or refusing of instructions to the jury; and it is claimed by the appellants that the rulings were not justified by the evidence.

There is no dispute that the tax deed to Douglas in 1865 was recorded, and that under it he had ostensibly the record title; certainly color of title.

In the absence of proof, Rothwell's possession may properly be presumed to have been under his (Douglas') title. It could only have been *presumed* to be under Hall's title, in any event; and such *presumption* would give way before actual proof to the contrary. That actual proof is found in Rothwell's testimony. He declares he had no lease, or contract of entry, from any one until he made the contract with Mrs. Douglas in 1867. There is no doubt about that contract, no contradiction; neither is there any doubt that Mrs. Douglas acted in this matter for her children, the appellees and heirs. She charged a portion of the taxes paid to them in her guardian accounts (p. 14).

Now, the inquiry which it seems needful for the court to make is this: Was there sufficient evidence of adverse possession by appellees for a period of twenty years, or more, o warrant the trial court in submitting that question to the Jury; and, if so, was the evidence sufficient to support the verdict which found such adverse possession to be proven?

The Douglas title, as shown by the Records, should not be lost sight of in considering the character and extent of the possession.

The reason of the rule which requires proof of actual occupation of land in order to create title by possession is this, that notice may be thus given to the owner of an adverse claim of title.

In the present case, the land records, and also the records in the tax collector's office, give notice of such adverse claim of title, as well as the visible occupation, and open use of the lot for storage, and stone-cutter's work.

A constructive possession of a part of a tract of ground may constitute *adverse* possession of the whole tract, when the possessor has color of title to the whole, and is in actual possession of a portion thereof.

> Tyler on Ejectment and Adverse Possession, 895.
> Ellicott *vs.* Pearl, 10 Peters, 412, 442.

Where one enters into possession under claim of title by

recorded deed, his entry and possession are referred to such title, and he is deemed to have *seisin* of the land co-extensive with the boundaries stated in his deed, if there is no one else in open adverse possession of any other portion of it.

Buswell on Lim. and Adv. Possession, Secs. 254, 255.
Prescott *vs.* Nevers, 4 Mason (C. C.), 326.

The presumption is that a party in possession under a recorded deed, is claiming adversely, and according to his title.

Forrest *vs.* Jackson, 56 New Hampshire, 357.
Wicks *vs.* Lake, 25 Wisconsin, 71.

An *owner* of ground cannot be excused for ignorance of the particular claim of right under which the premises were held by those in possession. He is not in the position of a casual observer, but must diligently look to his own interests, know the boundaries of his land, and ascertain the extent, meaning and locality of any settlement made within his lines without his authority.

Brownson *vs.* Scanlan, 59 Texas, 226.
Bracken *vs.* Jones, 63 Texas, 184, 187.

The recorded deed, and the open and notorious possession and use of the lot, were sufficient to give notice to the world of a claim of right to the lot in question; but the continued payment of the taxes was "*powerful evidence*" also of such claim, as this court has said in the case of—

Ellicott *vs.* Pearl, 10 Peters. 442, and in—
Fletcher *vs.* Fuller, 120 U. S. 534, 553.

The use of a vacant lot, openly, continuously, and exclusively, is equivalent to an enclosure of the same, or the erection of buildings thereon.

It is but another method of notifying the world that the

party is claiming the right of ownership—that his "flag" is planted there and kept flying over that ground.

Ewing *vs.* Burnet, 11 Peters, 49–51.

A careful analysis of the facts will show that the case of Stamper *vs.* Griffin, 20 Georgia, 312, cited on appellant's brief, is not applicable to this case.

Neither is the case of Ward *vs.* Cochran, 150 U. S. 597, for there the possession, which was so definitely characterized and which ripened into title, was a possession under a parol arrangement, and no color of title was upon the record.

The five elements necessary to constitute title by possession are clearly stated, and the proper qualification given to the word "actual" as distinguished from "constructive" when applied to the possession, in the recent case of Bradshaw *vs.* Scott, decided by the Court of Appeals of the District of Columbia, and reported in 4 D. C. Appeals, 527.

Tested by the rule there laid down, the instruction granted by the court below on behalf of defendants is correct.

The instruction granted for plaintiff (marked 2, page 12) gives him the benefit of the theory on which the rejected prayers were based, so far as he was entitled to any benefit therefrom.

We call attention to the opinion of Justice Morris, beginning on page 15 of the Record, and reported in 5 D. C. Appeals, and ask its careful consideration by the court.

There was evidence from which the jury could fairly find a verdict in favor of the defendants; and the instructions granted by the trial court properly left the question of adverse possession to them; and we therefore claim that there is no substantial error shown by the Record in this case, and that the judgment should be affirmed.

HENRY E. DAVIS,
JAMES S. EDWARDS,
JOB BARNARD,
Attorneys for Appellees.